U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 18May2001

CASE NO.: 1999-LHC-2989

OWCP NO.: 07-152590

IN THE MATTER OF:

HILTON HEBERT

Claimant

v.

MARK A. ROBICHEAUX, INC.

Employer

and

LOUISIANA WORKERS' COMPENSATION CORPORATION

Carrier

APPEARANCES:

David A. Dalia, ESQ.
For the Claimant

Patricia H. Wilton, ESQ.
For the Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Hilton Hebert (Claimant) against Mark A.

Robicheaux, Inc. (Employer) and Louisiana Workers' Compensation Corporation (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred on September 17, 1999, to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on August 3, 2000, in Metairie, Louisiana. However, prior to the scheduled hearing the parties agreed to cancel the hearing and submit the matter on a stipulated record. This decision is based upon a full consideration of the entire record.

Briefs were received from the Claimant and the Employer/Carrier on October 30, 2000. Based upon the stipulations of Counsel, the evidence introduced and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

The parties stipulated (EX-1), and I find:

1. That this claim falls under the jurisdiction of the Longshore and Harbor Workers' Compensation Act.

2. That Claimant's injury occurred during the course and scope of his employment with Employer on November 28, 1994.

3. That Carrier was the insurance carrier for Employer for obligations under the Act at all pertinent times herein.

4. That the Employer was given timely notice of the accident/injury.

5. That Employer/Carrier filed Notices of Controversion on May 29, 1997 and April 13, 1998.

6. That an informal conference before the District Director was held on August 23, 1999.

7. That Claimant was temporarily totally disabled from the date of injury through October 23, 1995 and that Claimant received temporary total disability benefits from the date of the injury through October 29, 1996, and again from November 20, 1996 through May 27, 1997, at a compensation rate of $262.29 per

week, totaling $33,541.88.

8. That Claimant received temporary partial disability benefits from October 30, 1996 through November 19, 1996 at a rate of $102.29 per week totaling $306.87 in benefits, and again from May 28, 1997, to the present and continuing at a compensation rate of $48.96 per week totaling $8,519.04 for a total of 174 weeks.

9. That Claimant's average weekly wage at the time of injury was $393.44 with a weekly compensation rate for total disability of $262.29.

10. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act, except for an evaluation and recommended surgery by Dr. James Butler. Claimant has been treated by Dr. H. Carson McKowen, a physician of his choosing.

11. That Claimant receives social security disability benefits pursuant to a decision on April 20, 2000.

12. That Claimant has at least a 15 percent permanent partial impairment of the whole body.

II. ISSUES

The unresolved issues presented by the parties are:

1. Nature and Extent of Claimant's disability.

2. Reasonableness and necessity of evaluation by Dr. James Butler.

3. Reasonableness and necessity of further surgery.

4. Attorney's fees.

III. STATEMENT OF THE CASE

Claimant was first deposed by the parties on July 13, 2000. At the time of his deposition, Claimant was on medication that made him drowsy, however he believed he could truthfully answer questions. (EX-2, p. 9).

Claimant was born April 4, 1949, and attended school through the ninth or tenth grade. (EX-2, p. 12). He can read and write "Medium" such that he can read a newspaper, but he has never held a job which required him to read or write. (EX-2, p. 13). Claimant stated he has never attended any vocational schools, although he had received training to perform engine maintenance while in the U.S. Army from which he was honorably discharged. (EX-2, pp. 13-14). Claimant resides in Morgan City, Louisiana, where he has lived since 1979. (EX-2, pp. 7, 9).

Besides his engine maintenance skills, Claimant learned to operate a "winch" while working for Schlumberger in the oil industry. His primary vocation has always been as a carpenter, a profession he learned from his father. (EX-2, pp. 14-15).

Claimant testified he was injured in November 1994 and has not worked since that time. (EX-2, p. 18). When the accident occurred, Claimant was employed as a carpenter for Employer, where he had worked for "one or two years" at the time of the accident. (EX-2, p. 22). In the course of his employment, Claimant performed carpentry on casino boats at Service Marine in Siracusa, Louisiana. (EX-2, p. 23).

Claimant testified the number of hours he worked in a given week varied based upon scheduling and whether Employer was running behind, but he frequently worked more than 40 hours per week. (EX-2, p. 24). Claimant estimated there were 7 to 8 carpenters working for Employer and he always worked with a second crew-member. (EX-2, p. 26). As a carpenter, Claimant's duties involved installing and fitting aluminum on the interior of casino boats. (EX-2, p. 27).

Prior to obtaining employment with Employer, Claimant worked as a carpenter on crewboats at the Gulf Craft facility in Patterson, Louisiana, for about 6 months. (EX-2, pp. 28-30). Claimant also worked as a truck driver for a company in Houma, Louisiana, and for the Schlumberger Corporation performing "wireline" work offshore for about ten years. (EX-2, pp. 32-33).

While employed at Schlumberger, Claimant injured his back and was off work for a week due to "a sprained muscle." (EX-2, p. 33). Additionally, Claimant had bypass surgery of the leg in 1972, and was involved in a car accident in 1996. (EX-2, p. 45). The day after the car accident, Claimant sought treatment at Lakewood Hospital in Morgan City, Louisiana. (EX-2, p. 41).

Claimant testified that as a result of the car accident he suffered pain in his left hip which radiated down to his ankle. (EX-2, p. 38).

In 1995, prior to his motor vehicle accident, Claimant began experiencing cardiovascular ailments. (EX-2, p. 46). He suffered from chest pains and was diagnosed with high blood pressure and a blockage. (EX-2, pp. 47-48). Claimant testified he recently began treatment with Valium for his "nerves" and he additionally suffers from high cholesterol. (EX-2, pp. 49, 51-52). He testified that although no doctor had recommended heart surgery, he expected it in the future because he was "seventy percent blocked." (EX-2, p. 54). Claimant is supposed to adhere to a special diet because of his high cholesterol, but does not do so. He further testified that he smokes a pack and a half of cigarettes a day, but has stopped drinking alcohol. Id.

At approximately 7 a.m. on November 28, 1994, Claimant suffered his work injury, while engaged in gathering tools for the day's work. He reached down into a tool box, picked up an air compressor and as he removed it, he "felt a sharp pain . . . in my lower back." (EX-2, p. 61).

Claimant continued to work, but by ten or eleven o'clock in the morning, he began suffering pain in his right leg and right lower back. Claimant's leg pain increased, and by noon he felt he could no longer walk and notified his supervisor. (EX-2, pp. 60-61). Claimant was later informed he should go to Dr. Fitter's office. (EX-2, p. 62).

Claimant was initially treated by Dr. Fitter before being referred to Dr. McKowen. (EX-2, p. 67). Claimant also decided to seek the services of Dr. Butler, an orthopaedic surgeon of whom he learned through his sister, because he "got tired of seeing neurologists." He saw Dr. Butler twice, but has been unable to return because his wife was laid-off and he lost his insurance coverage. (EX-2, p. 68). Claimant also saw doctors for his social security claim, but was unable to recall their names. (EX-2, p. 69).

Claimant testified his initial pain began in his right lower back and radiated down his right leg to his ankle. (EX-2, p. 71). He acknowledged the pain in his leg disappeared after a few weeks but he was left with numbness in his leg. Id.

Claimant's back pain has existed continuously since his initial work injury and he rates it as a "six" on a scale on one to ten, with ten being the worst pain he could imagine. (EX-2, p. 72).

Claimant testified that within a couple of weeks of his work injury he began suffering additional pain on the left side of his body. (EX-2, p. 64). He brought this to the attention of his treating physician, Dr. McKowen, who, Claimant testified, considered the pain a result of favoring his injured right side over his left. Claimant testified he raised the issue of his left side pain on 5 to 6 occasions, but he only saw it written down once. (EX-2, p. 66).

Claimant attributed his heart problems to the stress he has suffered since his injury, but acknowledged no doctor has ever told him that was the cause. (EX-2, p. 73). Claimant also suffers pain in his left hip and buttocks radiating down his left leg, but had pain only in his buttocks before his car accident. (EX-2, p. 71). Claimant's right leg has lost muscle tone which he believes restricts his mobility and causes him to fall. On one occasion, Claimant's "right leg just gave out" and he fell head first into a post. He reported these incidents to Dr. McKowen. (EX-2, pp. 73-74, 81).

Claimant had surgery performed on his right leg by Dr. McKowen in 1995, which failed to improve his condition. (EX-2, p. 84). Claimant continued to experience weakness and numbness post-operatively, although he testified that he adhered to a physical therapy regimen for three months. (EX-2, p. 85). Later, Claimant sought the services of Dr. Butler, who recommended fusion surgery be performed on Claimant's lower back. (EX-2, p. 85).

Claimant stated he met with several vocational rehabilitation counselors, including Mr. Allen Crane. (EX-2, pp. 86-87). Claimant acknowledged Mr. Crane found several jobs which were initially approved by Dr. McKowen, but were ultimately deemed unsafe for him to perform based on subsequent discussions with Dr. McKowen. (EX-2, pp. 87-89). Claimant reported he later discussed every job identified for him with Dr. McKowen who then failed to approve **any** job. (EX-2, p. 89). He also testified he did not intend to apply for jobs "as long as I can draw my disability," and denied Dr. McKowen had released him to return to work. (EX-2, p. 88).

Claimant initially testified he could not return to any kind of work, but later recanted and stated he could perform sedentary work. He reported he was not referred to sedentary jobs. (EX-2, pp. 89-90). Claimant testified he was referred to a dispatcher position with Acme Trucking, but the position had been filled. (EX-2, p. 89).

Claimant evaluated several positions referred by Mr. Crane, the first of which was at a fish dock. Claimant did not believe proper accommodations could be made for him to hold this job because he was told, "no one sits down around here." (EX-2, pp. 94-95). He did not discuss accommodations with the owner of the business.

Claimant acknowledged being referred to a cashier's job for which he did not apply because he believed it was not a sedentary job, although he was not certain what accommodations could be made for him. (EX-2, pp. 95-96).

Claimant did not apply for a position with the Post Office because his mailman told him the job required a civil service test. Claimant did not believe he could pass this test, for which a fee was charged. At the hearing, Claimant expressed a willingness to take the test. (EX-2, p. 97). He could not remember if he kept a job log or if he kept Mr. Crane informed of his progress. (EX-2, p. 99). Claimant did not seek any jobs on his own. Id.

Claimant was refused medical treatment by Dr. Butler and Dr. Cenac, an orthopaedic doctor, by his workers' compensation carrier. (EX-2, pp. 106, 108). He did not seek prior approval from Carrier before treatment with Dr. Butler. (EX-2, p. 109). Claimant's benefits were reduced during 1996 which brought about financial difficulties and "almost" resulted in his home being foreclosed. (EX-2, p. 106).

Claimant was again deposed by the parties on September 19, 2000. Claimant acknowledged his injury had occurred on November 28, 1994. (EX-3, p. 6). Since his injury, he has suffered from lower back pain and weakness in his right leg. (EX-3, p. 10). Additionally, he stated:

> I can't walk. I can't run. I can't do all the things I used to do. . . I can't dance no more . . . I can't walk fast no more. You know, I just can't do all the things I used to do. Id.

Claimant testified he can no longer perform activities which require prolonged standing or sitting, and is restricted from lifting more than 15 to 20 pounds. Id.

Claimant has experienced pain in his left buttocks, which he testified Dr. McKowen opined was from favoring his left leg over his right leg. Claimant denied his pain was a result of his car accident which occurred during the intervening period between his injury and his first deposition. (EX-3, p. 11).

Claimant testified he was seen by Mr. Crane who subsequently sent him information on job openings. (EX-3, pp. 12, 14-15). Some of these jobs were located in Houma and Raceland, Louisiana, but Claimant failed to interview for these positions because he and his wife share a car, which he indicated she needed to commute to her job. Claimant also complained the distance from his home in Morgan City, Louisiana, would have been burdensome. He estimated Houma was 30 to 35 miles from Morgan City and Raceland is 40 to 45 miles. (EX-3, p. 16).

Claimant testified he followed-up on several positions including jobs as a mechanic, in pest control, a restaurant attendant, a security guard, a fish cleaner, a sales clerk and a radio dispatcher. (EX-3, pp. 17-22). Claimant reported the dispatcher job was not available when he went to apply, and the position would have required frequent sitting, standing and walking. (EX-3, p. 18). Claimant indicated the security job was not acceptable because it would have required him to walk and climb stairs. The restaurant attendant position was not acceptable because it required him to act as a bouncer in an adjoining bar. Claimant testified he did not feel physically capable of performing any of the aforementioned jobs because he cannot climb stairs or stand for long periods of time without having extreme pain in his back which ultimately results in his right leg giving way and causing him to fall. (EX-3, pp. 19-20).

Claimant explained the seafood cleaner position involved dangerous working conditions with floor wet from seafood parts which would increase his propensity to fall. The job also required standing to perform duties which Claimant stated he could not do. (EX-3, pp. 21-22).

Although he never followed-up on the store clerk position

to ascertain more details, Claimant testified he was unable to perform that position because it would have required standing all day and stocking of shelves. Claimant based his decision not to apply on his own analysis of the perceived job requirements. (EX-3, pp. 22-23). Claimant expressed additional concern that he was not capable of performing the math required of a cashier. (EX-3, p. 23). He made low grades in school and has "poor" reading ability. (EX-3, pp. 28, 30).

Claimant testified the majority of his day is spent laying down because sitting for more than a half-hour causes pain in his back. (EX-3, p. 26). He can only stand for between 45 minutes and an hour without having to stoop down from pain. (EX-3, p. 27).

Claimant was certified for social security benefits based on his back and heart ailments. (EX-3, p. 30). Claimant indicated Dr. McKowen diagnosed him as suffering from a herniated disc in his back and loss of muscle tone in his right leg. (EX-3, p. 31). Post-surgery, Dr. McKowen told Claimant there was nothing else which could be done for his leg. (EX-3, pp. 30-31).

Prior to Claimant's injury, he was earning over $300 per week, which resulted in a workers' compensation payment of around $260, which was cut to $48 per week, according to Claimant, because he failed to check on the jobs identified by the vocational rehabilitation counselor. (EX-3, p. 32). Claimant acknowledged in his testimony that all of his medical care has been paid for, with the exception of ailments which have arisen in his left leg and a second referral to an orthopaedic physician at Tulane Medical Center. (EX-3, p. 33).

On cross-examination, Claimant indicated that he could not remember exactly when he had stopped drinking alcohol, but he never drank prior to a job interview. (EX-3, pp. 46-47). Claimant testified he seeks to have his compensation benefits returned to previous levels and be authorized medical treatment which would allow him to resume his work as a carpenter. (EX-3, p. 48).

Claimant testified Dr. Butler opined spinal fusion might relieve his pain. (EX-3, p. 49). He denied telling Dr. Butler he did not want to pursue surgery. He insisted he was considering the recommended procedure when his wife was laid-off and he lost insurance coverage. (EX-3, pp. 50-51). Claimant

testified he **does** want to have spinal fusion surgery. (EX-3, p. 52).

Claimant did not fill out a job application for **any** job. (EX-3, p. 56). Claimant, upon visiting the fish cleaning facility, never asked if accommodations could be made to provide for his work restrictions, although he did inquire whether anyone sat while performing the job. (EX-3, pp. 58-59). He believed the job was too dangerous for him to perform because of its slick floors. (EX-3, pp. 59-60).

Claimant admitted he did not apply for the cashier's job because, based on his observations, the job required constant moving around and he felt unable to perform it due to his painful condition. (EX-3, p. 61). He did not know what, if any, accommodations could be made for him. (EX-3, p. 62).

Claimant testified from a physical standpoint he **was** capable of performing the dispatcher job, except for the typing requirements, but when he went to apply for the position it was not available. (EX-3, p. 65). He testified if he had to sit for eight hours a day as a dispatcher, he would have problems. (EX-3, p. 84). He also testified if he could not find a job which made him "happy," he would not return to work because of the stress it would impose on him. (EX-3, p. 68). However, Claimant later clarified his testimony by indicating if he could find work which would help him pay his bills and provide for his family, he was willing to return to work. (EX-3, p. 70). Examples of positions Claimant felt he could perform include the dispatcher job and working on small motors with assistance in lifting. (EX-3, p. 74).

Medical Evidence

Jeffrey C. Fitter, M.D.

Dr. Fitter, a fellow of the American Academy of Orthopedic Surgeons and a diplomat of the American Board of Orthopaedic Surgery, first saw Claimant on November 28, 1994. (EX-12, p. 8). Claimant recounted lifting an air compressor that morning weighing between 20 to 30 pounds, and while twisting his body to

move away, he began feeling pain in his lower right back. He complained of pain in his right lower back radiating to his right thigh. Id.

Physical examination of Claimant showed he had 50 degrees of forward flexion in his lumbar spine and palpable right-sided muscle spasm with mild scoliotic list. Lateral bending on Claimant's right was restricted and painful. Dr. Fitter opined Claimant suffered a severe lumbar strain and "rule out lumbar disc rupture." Claimant was prescribed bed rest, flexion exercises, Vicodin and Soma until his next appointment. (EX-12, p. 8).

Claimant saw Dr. Fitter in follow-up on December 5, 1994. (EX-12, p. 7). Claimant still complained of pain and stiffness in his back which radiated to his right hip and thigh. Id. Dr. Fitter opined Claimant was displaying "flattening of the lumbar lordosis with spasm in the right musculature and marked restriction of motion." Id. In addition, Claimant complained of some loss of sensation in his right anterior thigh. Id. Dr. Fitter prescribed another week of bed rest. He recommended if improvement was not noted after bed rest, a lumbar CT scan would be ordered to rule out disc rupture. Id.

Dr. Fitter saw Claimant again on December 13, 1994, and although he observed symptomatic improvement in Claimant's condition, he also noted Claimant had lost reflex and had "subjective weakness" in his right quadriceps. (EX-12, p. 6).

On January 9, 1995, Dr. Fitter opined Claimant had developed "obvious right quadriceps atrophy" which was likely the result of a "significant disc rupture" in the L3 vertebral area based on his rapidly deteriorating progression. (EX-12, p. 3). Dr. Fitter referred Claimant for a CT scan which was performed on January 11, 1995, and showed a "large rupture at L3 on the right." (EX-12, p. 2). When Dr. Fitter reviewed these findings with Claimant on January 16, 1995, he recommended Claimant obtain a neurosurgical opinion. Id.

H. Carson McKowen, M.D.

Dr. Carson, a board-certified neurosurgeon, testified by deposition on August 30, 2000. He has been practicing

neurosurgery for 12 years. (EX-4, pp. 5, 59). Dr. Carson began treating Claimant on February 2, 1995, after a referral from Dr. Fitter. (EX-4, p. 7). Claimant was suffering from a back injury which Dr. McKowen's notes reflect occurred when Claimant was lifting an air compressor in the course of his employment as a carpenter. He developed severe back and right leg pain. Id. This developed into atrophy of Claimant's right quadricep and Dr. McKowen proposed "an operation to decompress the L3 nerve root by removing the disc herniation . . . at L3-4." Id.

A CT scan, MRI and myelogram were all performed and confirmed Claimant's diagnosis of disc herniation at L3-4 with nerve root compression. Subsequently, a right L3-4 microdiscectomy was performed on April 18, 1995. (E-4, pp. 7-9; EX-6, pp. 60-64). Claimant followed-up with Dr. McKowen post-operatively. Initially, he was prescribed bed rest and medication for muscle spasm and pain. (EX-4, p. 9). Dr. McKowen did not believe therapy did much to help Claimant, although he reported some improvement in muscle strength in his right leg during his September 11, 1995 examination. (EX-4, p. 10; EX-6, p. 15). Dr. McKowen opined Claimant reached maximum medical improvement on October 23, 1995, with a 15 percent permanent partial impairment rating to the body as a whole because of his right quadriceps atrophy, "which more severely limits his ability to stand, climb, etc." (EX-6, p. 16).

Dr. McKowen opined when he first began to treat Claimant he "was essentially down to a dead nerve root in the right leg." Id. He further opined the operation he performed was "a last resort" and because of Claimant's advanced condition all that could be done was to "pinch the nerve and hope that the patient guests (sic) better." Id.

Dr. McKowen ordered a functional capacity evaluation (FCE) for Claimant which was conducted on November 2 and 3, 1995. (EX-6, p. 53). The FCE delineated Claimant was capable of "sedentary work."[1] Specifically, he could exert up to ten pounds of force "occasionally" and/or a negligible amount of force "frequently" to lift, carry, push, pull or otherwise move

[1] "Sedentary work" involves sitting most of the time, but may involve walking or standing for brief periods of time. A job is considered sedentary if walking and standing are required only occasionally and all other sedentary criteria are met. (EX-6, p. 55).

objects, including the human body.[2] (EX-6, p. 55). Craig Pate, the physical therapist who conducted the FCE, concluded Claimant's abilities do not match the job description of a carpenter as he is unable to stand for long periods of time or ambulate long distances. (EX-6, p. 54). On November 9, 1995, Dr. McKowen opined, after reviewing the FCE, that Claimant could perform "some light work, too, as long as he doesn't have to do any climbing or anything that would require a lot of use of his leg . . ." (EX-6, p. 17).

On February 9, 1996, Claimant was examined by Dr. McKowen and complained of increasing back and right leg pain as the result of an auto accident. Id. Claimant raised these issues again February 26, 1996, and for the first time indicated he had developed left leg pain. (EX-4, pp. 11-12). Dr. McKowen testified he did not believe Claimant's right leg pain could have masked his left leg pain. (EX-4, p. 12). Claimant continued to treat with Dr. McKowen during 1996 and complained of numbness and pain in both legs. (EX-4, pp. 20-27).

On August 16, 1996, Dr. McKowen reported he thought Claimant was capable of some type of employment, but he did not further explain what restrictions, if any, should be placed on Claimant or what type of employment Claimant was capable of performing. (EX-6, p. 25).

Dr. McKowen opined Claimant's condition, as the result of his work-related accident, was disabling and:

> He would necessarily be restricted to sedentary duty based on the L3-4 disc herniation that caused the weakness in his leg. Basically a desk job; no lifting over ten or fifteen pounds, no excessive bending or stooping, no excessive crawling, climbing; avoidance of moving machinery . . . he should avoid unprotected heights because of the instability in the right leg.

EX-4, p. 19.

Dr. McKowen met with Claimant on November 14, 1996, and

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[2] "Occasionally" was defined as activity or a condition which exists up to 1/3 of the time and "frequently" was defined as activity or a condition which exists from 1/2 to 2/3 of the time. (EX-6, p. 55).

Claimant expressed concerns with some of the jobs to which he was being referred by Mr. Allen Crane. (EX-4, p. 22; EX-6, p. 27). Dr. McKowen indicated several jobs found by Mr. Crane were within Claimant's ability to perform, specifically, the dispatcher and seafood cleaner jobs. Claimant reported to Dr. McKowen that the dispatcher position was not available when he went to apply. Id. However, considering Claimant's quadriceps weakness, Dr. McKowen noted Claimant's concerns regarding standing for any length of time were valid as it affected other jobs identified. (EX-6, p. 27). With respect to a security guard position, Dr. McKowen testified he would not want Claimant to be in a position which required him to frequently climb stairs, and it would not be acceptable for him to act as a "bouncer at a nightclub." (EX-4, p. 23). Dr. McKowen opined it would be acceptable for Claimant to work as a sales clerk if he were able to sit and not required to exceed his rated lifting capacity. (EX-4, pp. 23-24). Dr. McKowen further opined it **would** change his opinion of acceptability for Claimant to perform the seafood cleaner job if he could not perform it seated. (EX-4, p. 24). If the delivery driver job required continuous delivering in and out of a large truck as well as lifting over 15 pounds, his opinion of acceptability would be affected.

Dr. McKowen opined Claimant suffers from "considerable impairment and disability" which he quantified based on the A.M.A. Guidelines as constituting a 10 to 15 percent permanent partial anatomical impairment rating. (EX-4, p. 26). Dr. McKowen opined the reasonableness of this impairment was based on Claimant's "severe atrophy of the quadriceps muscle" which was substantiated by his objective findings. (EX-4, pp. 26-27). Dr. McKowen summarized Claimant's findings as follows:

> Objective findings are loss of reflex at the right knee compared to a normal reflex in the left. Severe atrophy of his right quadriceps muscle. Severe loss of strength in his right quadriceps muscle, and . . . hip flexors as well. Pain is not objective. The MRI, myelogram and CT scan, which all showed that he had a disc herniation on the right at L3-4 compressing the L3 nerve root. His functional capacities evaluation, which shows him capable of doing sedentary work. And those tests are, I consider objective in that they have certain built in tricks and measurements to check for the validity and consistency of the patient's

> performance and those tests show that Mr. Hebert performed consistently and the test was valid.

EX-4, p. 27.

Dr. McKowen opined he had **no further surgical procedures which would benefit Claimant** and Claimant "got very little response from it because basically he had an unsalvageable nerve root." (EX-4, pp. 27-28).

On cross-examination, Dr. McKowen opined the functional capabilities test performed during the fall of 1999 was still accurate from the standpoint of Claimant's back problems. (EX-4, p. 31). Dr. McKowen opined Claimant's complaint of a blockage in his right leg in April 1998 was unrelated to his work accident of November 1994. He further stated Claimant's cardiac complaint is unrelated to his work accident. (EX-4, p. 32). Further, Dr. McKowen stated Claimant's left leg complaints were unrelated to his work accident since they surfaced only after his car accident. (EX-4, pp. 32-33, 44-45; EX-6, p. 31).

Dr. McKowen testified he believed Claimant is capable of performing sedentary work with restrictions as a result of his back injury and has been able to do so since October 1995. (EX-4, p. 33). However, Dr. McKowen found one instance of a notation of left leg pain during an office visit on September 11, 1995, prior to Claimant's automobile accident the following January 1996. (EX-4, p. 34). Dr. McKowen opined **more probably than not, Claimant's left leg pain was not the result of his work accident**, having occurred only one time nearly a year after his work accident and after a day of strenuous activity. (EX-4, p. 35).

Dr. McKowen testified he was not aware of any complaints of neck pain by Claimant prior to the auto accident. (EX-4, p. 36). Dr. McKowen was also not aware of any medical reason for Claimant to be evaluated by Dr. Cenac based on his testing and treatment of Claimant, beyond getting a second opinion of his treatment. (EX-4, pp. 36-37). Dr. McKowen did not recall Claimant making complaints about his left buttocks and telling Claimant it was because he was using his left side too much. (EX-4, p. 40). The diagnostic testing does not reveal any nerve compression on the left. (EX-4, p. 43).

Dr. McKowen testified while he believed it was "**reasonable**"

for Claimant to seek a second opinion he could not testify it was "**necessary**." (EX-4, p. 45). Dr. McKowen indicated it might be possible for Claimant to perform light-duty work if the particular job were tailored to Claimant's disability and did not involve the use of his right extremity. (EX-4, p. 37). Additionally, in regard to Claimant's job placement, Dr. McKowen testified he had never been deliberately misled by Mr. Crane and if Mr. Crane's representation of the jobs he identified to Claimant were correct, he would approve them. (EX-4, p. 39).

William L. Fisher, Jr., M.D.

Claimant was examined by Dr. Fisher on April 3, 1995, at Carrier's request. (EX-11, p. 2). Claimant stated he suffered from numbness in his right anterior thigh. Id. He denied pain in the left lower extremity, cervical area and upper extremities. He further denied a history of any significant back difficulties. Dr. Fisher opined Claimant suffered from a right lateral disc herniation. Id.

Dr. Fisher agreed with Dr. McKowen's recommendation that an exploration of Claimant's L3 disc be performed with an excision of disc fragments. (EX-11, p. 3). He stated it was "distressing that the patient has such marked changes and it is possible that even decompression of the nerve root will not result in full rehabilitation of the nerve root damage." Id.

Department of Veterans Affairs

In March 1998, Claimant sought treatment at the New Orleans, Louisiana Veterans Administration Hospital (hereinafter V.A.). (EX-9, p. 18). The V.A. treated several of Claimant's chronic ailments including his cardiovascular disease, elevated cholesterol and back pain. Id.

Claimant followed-up at the V.A. and had an EMG performed on January 25, 1999. The EMG revealed Claimant had L4-5 radiculopathy. (EX-9, p. 14). At a follow-up on March 22, 1999, Claimant presented with increased pain in his left back radiating down his left leg. Claimant articulated that his pain increased with activity. He was prescribed an increased dosage of pain medication and a back brace to reduce movement. (EX-9, p. 12).

Claimant had a neurology follow-up on July 26, 1999, which

showed a bilateral L4-L5 radiculopathy. (EX-9, p. 11). Claimant stated he was at the V.A. because "he wants disability." Id. During an August 1999 follow-up at the V.A. Primary Care Clinic, Claimant complained of chest pains and stated he had an angiogram performed by his cardiologist which showed increased blockage. (EX-9, p. 10). Claimant also complained of anxiety for which he was prescribed Valium. Id.

Claimant was treated in December 1999 for soreness in his left pectoral and epigastric area. (EX-9, p. 8). He also complained of gastric discomfort when he ingested certain types of foods. Id.

Claimant was seen in the V.A. Neurology Clinic on January 7, 2000, and recounted having had an MRI performed at Tulane Medical Center. (EX-9, p. 7). Claimant stated Dr. Butler had prescribed surgery for his back. He was unable to afford the surgery because he had lost insurance coverage. Id. Claimant was instructed to bring his MRI results at his next follow-up appointment, but failed to do so for his March 15, 2000 visit to the V.A. Neurosurgery Clinic. (EX-9, pp. 7, 5).

James Butler, M.D.

Claimant was first seen by Dr. Butler on November 1, 1999, at the Tulane University Medical Center in New Orleans, Louisiana, upon a referral from his attorney in his social security claim. (EX-7, pp. 11, 13). Claimant complained of lower back pain radiating to both legs, with numbness and tingling in the right leg and thigh, and numbness and tingling in the left leg through the calf. Id. Claimant reported his work injury rendered him unable to walk for long because his leg "gives out." Id. Dr. Butler opined Claimant suffered from diffuse sclerotic changes involving the pedicles and an apparent bone cyst in the interior/posterior aspect of the L3 and L4 vertebra. (EX-7, p. 17).

Dr. Butler ordered an MRI performed on November 19, 1999. (EX-7, p. 14). Based on the MRI and his examination, Dr. Butler observed signs of recurrent disc herniation. He noted multilevel diffuse disc bulge at L2-3, L4-5, and L5-S1 with exiting nerve root approximation noted bilaterally at the L2-3 level. There was compression of the existing left L4 nerve root approximation from an associated broad-based leftward disc protrusion. He further observed small posterior central and

left lateralizing disc protrusions at L1-2. (EX-7, pp. 15-16).

Based on his clinical observations and the MRI, Dr. Butler opined Claimant suffers from chronic back with residual weakness and diminished sensation in the L5 nerve root of his right leg. (EX-7, p. 5). Dr. Butler further opined Claimant's condition was characteristic of post-laminectomy syndrome and lumbar degenerative disc disease with "probable residual stenosis." Id.

Because of Claimant's desire not to undergo any further surgical procedures, Dr. Butler reported "there is nothing else to offer" Claimant. He assigned a permanent partial disability rating of 15 percent. Id.

Vocational Evidence

Ms. Beverly Mann

Ms. Beverly Mann is employed by Vocational Services, Inc. All of her correspondence is addressed to Mr. Michael Moffett, a vocational rehabilitation specialist at the U.S. Department of Labor. Ms. Mann's reports and correspondence do not indicate she was hired by the U.S. Department of Labor but apparently was assigned to conduct vocational rehabilitation of Claimant. Claimant first met with Ms. Mann on November 7, 1995. (EX-14, p. 15). He expressed "an interest in vocational rehabilitation services and a return to work as soon as possible." Id. Claimant gave a history of being a high school graduate without any special vocational training, although he did engine repair work while serving in the military. (EX-14, pp. 15-16). His adult life has been spent working as a carpenter. (EX-14, p. 17). In this capacity, Claimant indicated he could "read and utilize blueprints, measure with a tape, as well as estimate material costs and amounts." Id. He is able to repair washing machines and build cabinets. (EX-14, p. 18).

Claimant stated he **did** have transportation, although driving more than 45 minutes caused him discomfort. (EX-14, p. 16). He indicated his physical ailments included weakness in his right leg and pain in his lower left back and left leg. Id. He has difficulty standing more than 20 minutes at a time and climbing stairs is especially problematic. (EX-14, pp. 16-17). He had no difficulty "sitting, bending or utilizing his hands and arms." (EX-14, p. 17).

Claimant indicated an interest in vocational technical school, but he hoped that he would be able to return to a job which utilized his carpentry skills. (EX-14, p. 18).

In a subsequent phone conversation with Ms. Mann, Claimant stated he preferred to own and operate his own shop, either performing carpentry work or small engine repair. (EX-14, p. 19). Ultimately, Claimant was in agreement that he was physically unable to perform the carpentry job and the only way he could perform engine repair work would be with special equipment to overcome his disability. (EX-14, p. 21).

On November 29, 1995, the "Tests of Adult Basic Education, Level 19" were administered to Claimant. (EX-14, p. 19). Based on these tests, Ms. Mann reported Claimant could read at a minimal high school level and should have "no difficulty understanding simple written instructions." Id. However, Claimant's mathematics mastery was much lower than his verbal mastery and Ms. Mann believed Claimant would require "remediation" prior to any type of technical training, and additionally would need assistance in record-keeping if he were to run his own repair shop. Id. Ms. Mann considered Claimant capable of performing entry level jobs which require the use of everyday mathematics such as "counting or making change, using money, or solving practical problems with whole numbers." Id.

On November 29, 1995, Ms. Mann reviewed Claimant's FCE and noted:

> [Claimant] has inability to stand or walk for long periods or to lift any significant weight. [Claimant] had significant deficits performing repetitive squatting, stair climbing, or ladder climbing, balancing, standing, forward bending, or lifting.

EX-14, p. 21.

Claimant's lifting capacities revealed the maximum he could lift "would be ten pounds rarely, five pounds occasionally, and no lifting frequently or constantly." Claimant "was considered able to carry 20 pounds rarely, 15 pounds occasionally, 10 pounds frequently, and 5 pounds constantly." (EX-14, p. 21).

Claimant met with Ms. Mann again on December 8, 1995. (EX-14, p. 10). An on-the-job training program was discussed

whereby Claimant could work at a small engine repair shop during which part of his wages would be paid by the Department of Labor while he learned the trade. (EX-14, pp. 10-12).

In a telephone call to Claimant on January 11, 1996, Ms. Mann ascertained that Claimant was not interested in attending the small engine repair class and was considering retirement pending a social security disability award. (EX-14, p. 6).

Ms. Mann telephoned Claimant again on February 12, 1996. (EX-14, p. 23). Claimant indicated he had spoken with Dr. Carson McKowen following his motor vehicle accident and had discussed the small engine repair job. In her March 26, 1996 report, Ms. Mann recommended that Claimant's file be closed because of Claimant's failure to follow-up on job-searching activities. (EX-14, p. 3). Additionally, Claimant had failed repeatedly to return calls or engage in regular communication with Ms. Mann.

Allen L. Crane

Mr. Crane is a licensed vocational rehabilitation counselor practicing in Houma and Metairie, Louisiana. (EX-5, p. 5). Mr. Crane met with Claimant at the request of Carrier for an initial vocational assessment on May 1, 1996. (EX-5, pp. 8-9, 51). A vocational interview was performed, followed by vocational testing to evaluate his ability to return to work. (EX-5, p. 9). Mr. Crane testified it was his understanding Claimant was limited by his physical therapist to sedentary duty, but Claimant's treating physician, Dr. McKowen, opined he **could** perform some light work as long as it did not require any climbing or extensive use of his weakened leg. (EX-5, pp. 10-11). Mr. Crane also testified Claimant indicated in his interview that he could read and write, and was "able to make change." (EX-5, p. 11).

Mr. Crane administered several tests to Claimant, including the Wide Range Achievement Test and an interest inventory. (EX-5, p. 11). Claimant scored at the fourth grade level in spelling, and at the fifth grade level in reading and mathematics. (EX-5, pp. 11-12). Claimant was further interviewed about his vocational and future plans. He had considered opening a small engine repair shop and hoped to receive social security benefits. (EX-5, p. 13).

Claimant informed Mr. Crane that **he had worked some odd jobs after his work-related injury** which included lawnmower and washing machine repairman, although Claimant indicated he experienced pain while working. (EX-5, p. 14).

Mr. Crane attempted to find suitable alternative employment for Claimant in several areas which he believed were appropriate based on Claimant's physical and intellectual capabilities. (EX-5, p. 15). Four labor market surveys were performed and Mr. Crane identified 18 jobs which he believed were within Claimant's physical capabilities. (EX-5, pp. 17-18).

The first job Mr. Crane identified was with The Car Doctor working as a repairman in Houma, Louisiana. (EX-5, pp. 19-20). This position was available on July 9, 1996. (EX-13, p. 48). Mr. Crane believed Claimant had some transferable skills based upon training he received while in the U.S. Army. (EX-5, p. 19). This job did not require any lifting of heavy equipment and the employer would consider accommodations for Claimant. (EX-5, p. 20). The position involves frequent standing and walking, and occasional sitting, stooping and crouching. (EX-13, p. 48). Mr. Crane testified the position did not require Claimant to sit, stand, kneel, crouch, stoop or perform any other physical activity beyond the limitations identified and assigned by Dr. McKowen. (EX-5, p. 20). The starting pay for this position ranged from $1000 to $1500 per month "depending on [Claimant's] work output." (EX-5, p. 21). Mr. Crane reported Claimant never filed an application. (EX-5, p. 19). Mr. Crane also testified Claimant never expressed difficulties finding transportation to work. (EX-5, pp. 20-21).

The second job identified was with Sunshine Equipment in Thibodaux, Louisiana. (EX-5, p. 21). This position was available on July 9, 1996, and had a starting salary of $5.00 per hour and paid up to $14.00 per hour. (EX-13, p. 49). This job also involved small engine repair. The position required frequent standing and walking with occasional sitting, stooping and crouching. Id. Mr. Crane testified the employer was willing to work with Claimant in considering possible accommodations. Id. He reported Claimant never applied for this position. (EX-5, p. 22).

The third position identified was with Orkin Pest Control in Houma, Louisiana. (EX-5, p. 22). This position was available on July 9, 1996, and paid between $1,000 and $1,500

per month. (EX-13, p. 49). This job required occasional lifting of up to 25 pounds, frequent standing and walking with occasional stooping and crouching. Mr. Crane indicated this was a borderline job with regard to its physical requirements. (EX-5, pp. 22-23). He reported Claimant never applied for this position. (EX-5, p. 23). Claimant was referred to a second pest control job in Houma, Louisiana, at Terminix with similar physical requirements as Orkin Pest Control to which he also failed to apply. (EX-5, p. 24).

In the second labor market survey, Mr. Crane identified a security guard job with Acadian Inn in Morgan City, Louisiana. (EX-5, p. 25). This position was available on October 7, 1996, and paid $7.52 per hour. The job required alternate walking and standing, no lifting, squatting, bending or stooping. (EX-13, p. 45). Mr. Crane initially believed the job was appropriate for Claimant based upon his work restrictions and his discussions with the employer. He acknowledged that if Claimant were required to act as a bouncer and climb stairs in this position, he would not have included this position as alternative employment for Claimant. (EX-5, pp. 25-27).

Mr. Crane next identified a dispatcher position with the St. Mary's Parish Sheriff's Office. (EX-5, p. 28). This position was available on October 7, 1996, paid $5.00 to $6.00 per hour, and involved answering incoming calls, dispatching units and some "light data entry." Frequent sitting, alternate standing and walking and lifting the weight of paper was required in the job. (EX-13, p. 46). This job did not require a high school diploma, and Mr. Crane believed this position was something Claimant was capable of performing based on his physical and cognitive abilities. (EX-5, p. 29). Mr. Crane testified Claimant never applied for this job and it is a position with "recurrent" job openings which Claimant could obtain if he were to pursue the position. (EX-5, p. 29).

The next job identified by Mr. Crane was a seafood cleaner position with Bailey's Basin Seafood in Morgan City, Louisiana. (EX-5, pp. 29-30). This position was available on October 7, 1996, and paid $5.00 to $6.00 per hour. (EX-13, p. 46). Mr. Crane testified that based on conversations with management at Baily's, **Claimant could sit while performing this job**, alternate standing and walking were also allowed. Additionally, the hours and pace of this job were flexible and could be tailored to individual workers. (EX-5, p. 30). Mr. Crane stated that

additional accommodations could be arranged for Claimant to alleviate any concerns he may have regarding the safety of his work area. (EX-5, p. 31).

Mr. Crane identified a cashier position at a Circle K convenience store in Morgan City, Louisiana. The manager of this facility indicated that Claimant could be allowed to sit during slow periods to accommodate his difficulty standing. (EX-5, p. 32). However, frequent standing and occasional walking and stooping were required in the job. The starting salary was $5.00 per hour. (EX-13, p. 46).

A position re-filling the salad bar at Shoney's Restaurant in Morgan City, Louisiana, was next identified. (EX-5, p. 34). This position was available on October 7, 1996, and paid $5.00 per hour. (EX-13, p. 46). This position required Claimant to carry trays of food stuffs to the salad bar, keep it filled and engage in frequent standing and occasional walking. (EX-13, p. 47). There was no lifting over twenty pounds and employees are permitted brief sitting breaks. Id.

In his third labor market survey, Mr. Crane identified another set of positions for Claimant on January 23, 1997. (EX-5, p. 34). The first position was a dispatcher with Acme Trucking which required dispatching heavy trucks, assigning pick-up and delivery sites and taking orders after hours and coordinating truck drivers. This position was available on January 23, 1997, and paid $9.25 per hour. The job involved mainly sitting and required no lifting. (EX-13, p. 39). Mr. Crane described this job as one "that recurrently come[s] available." (EX-5, p. 35). Mr. Crane acknowledged that Claimant reported this position was already filled when he went to apply. (EX-5, pp. 34-35).

The next position identified was a pizza delivery job with Domino's Pizza in Morgan City, Louisiana at five different locations. This position was available on January 23, 1997, and paid $8.00 to $9.00 per hour. (EX-13, p. 40). There was also a pizza delivery position with Pizza Hut in Morgan City, Louisiana. These positions "recurrently come available." The employers allowed flexible hours and lifting of less than 20 pounds was required. (EX-5, pp. 36-37, 39). Duties involved mainly delivering phoned-in pizza orders and some general store cleaning. The position required mainly sitting but also frequent standing. (EX-13, p. 40).

A job as mail carrier or postal clerk with the Houma, Louisiana Post Office was next identified. This position was available on January 23, 1997, and paid $13.84 per hour. (EX-13, p. 30-41). Mr. Crane reported this position was considered light work with alternate sitting, standing and walking and no lifting required. The mail carrier involved "some walking" but "most of it is driving." (EX-5, p. 37).

Mr. Crane next identified a machine operator position with K&B Works in Houma, Louisiana. (EX-5, p. 38). Mr. Crane testified this position involved operating a lathe machine, setting the specifications and then fabricating small oil field tools. He reported the physical requirements fit within Claimant's restrictions as he understood them to exist. The job allowed alternate sitting, standing and walking with stooping and crouching done on an occasional basis. Cranes and hoists are used to do the majority of lifting. Accommodations can be made for lifting. This position had an entry level salary of $7.00 per hour. (EX-13, p. 41).

Mr. Crane identified more positions available in July 9, 1997, in his fourth labor market survey. A position as a flower delivery person with Doris Flower and Gift Shop in Raceland, Louisiana, was reported. Mr. Crane noted Claimant "would not be required to lift anything above his restrictions." (EX-5, p. 39). The job involved alternate sitting, standing and walking with occasional bending and lifting up to ten pounds. This position paid $6.00 to $8.00 per hour. (EX-13, p. 37).

A Domino's Pizza delivery positions was again identified in Morgan City, Louisiana. Alternate sitting, standing and walking was involved with occasional bending and lifting up to 10 pounds. (EX-13, p. 38). These positions paid $8.00 to $9.00 per hour with the same physical requirements as noted above. (EX-13, p. 40). Mr. Crane testified Claimant did not apply for this position. A Pizza Hut delivery position was again identified in Morgan City, Louisiana. (EX-5, p. 39). Claimant did not apply for this position. (EX-5, p. 40).

Another security job with the Acadian Inn in Morgan City, Louisiana, was identified which paid $7.99 per hour. The job required alternate standing and walking. (EX-13, p. 38). Mr. Crane testified Claimant did not apply for this position. (EX-5, p. 40).

In a survey performed immediately prior to the hearing, Mr.

Crane reported Claimant could start working as a security guard with American Citadel in September 2000. (EX-5, p. 40). He noted this position did not involve any climbing or lifting. Claimant would be required to complete paperwork and patrol the area by foot or vehicle. The starting salary was $6.50 per hour. (EX-5, p. 41).

A position with Ray's Repair Shop in Morgan City, Louisiana, was next identified by Mr. Crane. There would be no lifting over twenty pounds with frequent sitting and alternate standing and walking involved. The starting salary for this position was between $6.00 to $8.00 per hour. (EX-5, p. 41).

The final position Mr. Crane identified was a pizza delivery job with Papa John's Pizza. The location was not reported. There would be no lifting over fifteen pounds, with frequent sitting, alternate standing and walking required. The salary is $5.15 per hour plus tips, plus $.75 per delivery. (EX-5, p. 42).

Mr. Crane estimated Claimant could expect to earn between minimum wage and $8.00 per hour based on the jobs available and his work restrictions. (EX-5, p. 43).

On July 11, 1996, Mr. Crane corresponded with Dr. McKowen regarding Claimant's physical abilities to perform the following identified jobs: automobile repairman, mechanic and pest control technician. Dr. McKowen approved only the pest control job on August 16, 1996. (EX-13, pp. 13-15).

On October 7, 1996, Mr. Crane again corresponded with Dr. McKowen to consider the appropriateness of the following identified jobs: hotel security guard, public safety dispatcher, seafood cleaner, sales clerk/cashier in a convenience store and salad bar attendant. On October 29, 1996, Dr. McKowen approved all of the foregoing jobs. (EX-13, pp. 9-12).

On January 23, 1997, Mr. Crane contacted Dr. McKowen regarding Claimant's physical ability to perform the jobs of dispatcher at Acme Trucking, pizza delivery driver in Morgan City, Louisiana, the postal clerk and mail carrier jobs, machine operator in Houma, Louisiana, and delivery driver for a flower and gift shop. On February 25, 1997, Dr. McKowen approved all jobs as within Claimant's capabilities, except the machine operator position. (EX-13, pp. 4-8).

Mr. Crane testified Claimant was contacted after each of the four labor market surveys beginning in July 1996 but at no time was he informed Claimant had problems with the jobs identified or that Claimant was unable to apply because he did not have available transportation. (EX-5, p. 46). Mr. Crane stated if Claimant had diligently pursued employment "he would have had a very good prognosis of finding work" and **there was no doubt in his mind that suitable employment has existed continuously from the time Claimant was released for work to the present.** (EX-5, pp. 51-52).

Mr. Crane acknowledged some of the mechanic jobs which he identified were not acceptable to Dr. McKowen. He also acknowledged he identified some jobs with lifting requirements of 25 pounds. (EX-5, p. 70). Mr. Crane further acknowledged that some of the jobs, particularly the pest control job, did require crouching. Id. Mr. Crane testified that his office's last communication with Claimant was July 15, 1997. (EX-5, p. 90).

The Contentions of the Parties

Claimant argues that he is permanently and totally disabled from his work accident and Employer/Carrier have failed to demonstrate suitable alternative employment despite Claimant's diligent search for alternative employment. Claimant further argues that Employer/Carrier should be required to pay for all unpaid medical treatment incurred as a result of the work accident, including an evaluation by an independent medical specialist.

Employer/Carrier, on the other hand, argue all the medical evidence demonstrates that Claimant has a permanent partial impairment of 15 percent of the whole body and has a residual functional capacity of at least sedentary and light-duty work. Employer/Carrier contend no authorized physician has recommended surgery for Claimant in this matter. Employer/Carrier also contend suitable alternative employment has been established and Claimant did not act with due diligence in pursuing alternative employment. Finally, Employer/Carrier argue Claimant sought a change of physician without the knowledge or consent of Employer/Carrier and any costs associated with that change of physician should not be taxed to Employer/Carrier.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. V. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Nature and Extent of Claimant's Disability

The parties stipulated and I find that Claimant suffered a compensable injury on November 28, 1994, in the course and scope of his employment with Employer. However, the burden of proving the nature and extent of his disability rests with Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this

standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968) (per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). Trask, 17 BRBS at 60. Any disability suffered by Claimant before reaching MMI is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once the claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

The traditional method for determining whether an injury is permanent or temporary is the date of MMI. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of MMI is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10

BRBS 915 (1979).

An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and MMI will be treated concurrently for purposes of explication.

In the instant case, Claimant has established a prima facie case of total disability as he cannot return to his former employment. The FCE ordered by Dr. McKowen, as well as Dr. McKowen's testimony, establish that Claimant was restricted to sedentary work after his work injury and could no longer perform the duties of his former job as a carpenter. No doctor has released Claimant to his former employment. Therefore, I find Claimant has established he is totally disabled under the Act. Claimant is temporarily and totally disabled until he reaches MMI.

In light of the testimonial and medical evidence of record, I find Claimant was temporarily and totally disabled from the date of injury, November 28, 1994, to the date he reached MMI, October 23, 1995, as he was unable to return to his former employment. Claimant's treating physician, Dr. McKowen, opined Claimant reached MMI on October 23, 1995, approximately six months after his microdiscectomy and has been physically capable of sedentary to some light work since. Dr. McKowen reached this reasoned conclusion based upon Claimant's severe atrophy in his quadriceps muscle and other objective findings. After October 23, 1995, I find Claimant is permanently and totally disabled until such time Employer/Carrier established suitable alternative employment for Claimant.

B. Suitable Alternative Employment

If the claimant is successful in establishing a prima facie case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Turner, Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992). However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane, 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane, 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991). In so concluding, the Board adopted the rationale expressed by the Second Circuit in Palumbo v. Director, OWCP, 937 F.2d 70, 76 (2d Cir. 1991), that MMI "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis." The Court further stated that ". . . It is the worker's inability to earn wages and the absence of alternative work that renders him totally disabled, not merely the degree of physical impairment." Id.

In the present matter, Employer/Carrier rely on the FCE and the labor market surveys of Mr. Crane to establish suitable alternative employment. Claimant relies on the FCE and the testimony of Dr. McKowen in rebuttal.

The FCE ordered by Dr. McKowen delineated Claimant is capable of performing sedentary work. Dr. McKowen consistently opined Claimant is capable of performing sedentary work with no lifting over fifteen pounds, no excessive bending or stooping, no excessive crawling and climbing, avoidance of moving machinery and avoidance of unprotected heights because of the instability of his leg. Dr. McKowen reported Claimant could perform "basically a desk job." He reasonably opined Claimant has been able to perform sedentary work with the above restrictions since he reached MMI on October 23, 1995.

The FCE revealed Claimant cannot stand or walk for long periods and has significant deficits performing repetitive squatting, stair-climbing, ladder-climbing, balancing, forward bending or lifting. Claimant could lift ten pounds rarely and five pounds occasionally with no lifting frequently or constantly. He can carry twenty pounds rarely, fifteen pounds occasionally, ten pounds frequently and five pound constantly.

In his four labor market surveys, Mr. Allen identified eighteen specific positions which he testified constituted suitable alternative employment.

The repairman position with The Car Doctor was available on July 9, 1996. This job required frequent standing and walking.

This position is hereby rejected as suitable alternative employment because Dr. McKowen disapproved the job and credibly opined Claimant was restricted to sedentary and some light work and does not possess the physical capacity to frequently walk and stand, which this position requires.

The repairman position with Sunshine Equipment was also available on July 9, 1996. This job also required frequent standing and walking. Dr. McKowen also disapproved this position on August 16, 1996.

The pest control technician position with Orkin Pest Control was available on July 9, 1996. Mr. Crane acknowledged this position involved stooping. Although Dr. McKowen approved this job, it clearly exceeds Claimant's physical capacity since it requires frequent standing and walking with only occasional sitting and lifting up to 25 pounds. Accordingly, this position is not considered suitable for Claimant.

The security guard position with Acadian Inn was available on October 7, 1996. Claimant testified this position also involved serving as a bouncer at an adjoining bar. Dr. McKowen testified it would not be acceptable for Claimant to serve as a bouncer at a bar. This position is hereby rejected as suitable alternative employment because Dr. McKowen credibly opined Claimant was restricted to sedentary and some light work and thus did not possess the physical capacity to frequently walk and climb stairs, which is a requirement of this position. Moreover, Dr. McKowen testified it would not be appropriate for Claimant to work as a bouncer at a bar. Mr. Crane agreed that the job would not be appropriate if bouncer duties were required.

The dispatcher position with St. Mary's Sheriff's Office was available on October 7, 1996. Dr. McKowen approved this position which appears to be within Claimant's physical capacity. The record does not reflect whether Claimant applied for this position. However, since the record discloses that only the dispatcher position at Acme Trucking had been filled at the time Claimant applied, I find the ST. Mary's Sheriff's Office dispatcher job appropriate for Claimant since it permits frequent sitting and alternate standing and walking. Claimant would have earned $5.00 per hour as an entry wage for 40 hours per week or $200.00 weekly.

The seafood cleaner position with Bailey's Basin Seafood was

available on October 7, 1996. Dr. McKowen also approved this job since the description provided indicated the job requires frequent sitting and alternate standing and walking. Therefore, I find this job is within Claimant's physical capabilities and thus appropriate. Since the wage rate is based on poundage cleaned and ranges from $5.00 to $6.00 per hour, I find Claimant's wage earning capacity to be $5.00 per hour, 40 hours per week, or $200.00 weekly.

The cashier position with Circle K convenience store was available on October 7, 1996. Claimant testified this position involved standing for long periods and stocking shelves. Although Dr. McKowen approved this job, it involves frequent standing, which exceeds Claimant's physical capacity to stand for long periods of time. Thus, this position is not considered suitable for Claimant.

The salad bar prep attendant position with Shoney's Restaurant was available on October 7, 1996. This position is also rejected because it requires frequent standing with only brief sitting periods.

The dispatcher position with Acme Trucking was available on January 23, 1997. Claimant testified this position was not available when he went to apply. The record does not set forth when Claimant applied for this position. In the absence of contrary evidence, I find Claimant applied in a reasonable amount of time after being notified of its availability by Mr. Crane. Therefore, this position is rejected as suitable alternative employment since it was unavailable when Claimant applied.

The pizza delivery positions with Domino's and Pizza Hut were available on January 23, 1997. These positions involved mainly sitting with frequent standing along with lifting and carrying up to ten pounds. Dr. McKowen approved these positions as within Claimant's physical capacity. I find the delivery driver jobs to be appropriate. The delivery driver jobs located in Morgan City, Louisiana, paid hourly rates of $8.00 to $9.00. I find the driving distance of 30 to 35 miles to Morgan City from Claimant's residence in Houma, Louisiana, to be reasonable in searching for and maintaining alternative employment. I further find that Claimant could earn $320.00 weekly at the starting rate as a full-time employee (40 hours x $8.00).

The mail carrier and postal clerk positions with the Houma,

Louisiana Post Office were available on January 23, 1997. Claimant testified these positions involved a civil service examination, which he believed he could not pass. Claimant did not take the exam because of the fees charged. These positions involved alternate sitting, standing and walking. The postal clerk job required no lifting whereas no details of the lifting requirements of a mail carrier were noted. Educational requirements were not specified. Both jobs were classified as a light-level position which were approved by Dr. McKowen. However, I reject the mail carrier position since it is not fully described specifically the lifting requirements and the duration of the alternate standing and walking requirements. I am not convinced based on this record that Claimant has the educational achievements necessary to qualify for either position nor the educational levels to successfully compete for either job given the civil service examination requirements. Therefore, I find neither job suitable for Claimant.

The machine operator position with K&B Works was available on January 23, 1997. This position involved alternate sitting, standing and walking with stooping and crouching required on an occasional basis. This position was rejected as suitable alternative employment by Dr. McKowen. A lifting restriction can be discussed during the job interview and accommodations can be made since the majority of lifting is performed by hoists and cranes. I find the job description gathered by Mr. Crane to be unspecific and vague and disagree with his vocational opinion that this job is suitable for Claimant. The general description provided does not lend credence to a reasoned opinion that this job is within Claimant's physical capabilities. Therefore, it is rejected as suitable alternative employment.

The flower delivery position with Doris Flower and Gift Shop in Raceland, Louisiana, was available on January 23, 1997. This position is considered light and involved alternate standing, walking and sitting along with lifting and carrying up to ten pounds. The job also required occasional crouching, stooping and climbing. Dr. McKowen approved this position as within Claimant's physical abilities. The employer is willing to accommodate physical restrictions. I find this position to be suitable and not beyond a reasonable driving distance from Claimant's residence. Claimant could earn from $5.00 to $7.00 hourly, but I find he would earn $200.00 weekly based on an entry wage of $5.00 per hour.

The pizza delivery positions with Domino's and Pizza Hut were available on July 9, 1997. These positions involved alternate standing, walking and sitting along with occasional bending and lifting and carrying up to ten pounds. Dr. McKowen previously approved similar positions. Therefore, I find this job suitable. I find the entry hourly wage to be $6.00 with a wage earning capacity of $240.00 per week.

The security guard position with Acadian Inn was available on July 9, 1997. Claimant testified this position also involved serving as a bouncer at an adjoining bar. Dr. McKowen testified it would not be acceptable for Claimant to serve as a bouncer at a bar. This position is hereby rejected as suitable alternative employment.

The security guard position with American Citadel was available on September 6, 2000. This job requires patrolling an assigned area by walking or riding, no climbing or lifting is required. I find Claimant could perform motorized patrol but not walking patrols. The hourly wage available is $6.50.

The position with Ray's Repair Shop was available on September 6, 2000. The employee is responsible for repairing small engines and is <u>not</u> required to lift above 20 pounds. Frequent sitting, alternative standing and walking are required. This job clearly exceeds Claimant's lifting restrictions of 10 to 15 pounds. Accordingly, I find the position does not constitute suitable employment for Claimant.

The pizza delivery position with Papa John's Pizza was available on September 6, 2000. This position involved frequent sitting and alternate standing and walking along with lifting and carrying not to exceed 15 pounds. This position is similar to other delivery jobs approved by Dr. McKowen. Therefore, I find it comports with Claimant's physical capacity. The starting wage rate is $5.15 per hour, plus $.75 per deliver.

Based on the foregoing, I find Employer/Carrier has established appropriate suitable alternative employment for Claimant within the restrictions assigned by his treating physician. Having found the following jobs suitable at the hourly rate noted: St. Mary's Sheriff's Office dispatcher position [$5.00 per hour or $200.00 per week]; the seafood cleaner job [$5.00 per hour or $200.00 per week]; the January 1997 pizza delivery driver jobs [$8.00 per hour or $320.00 per week]; the flower delivery position [$5.00 per hour or $200.00

per week]; the July 1997 pizza delivery driver jobs [$6.00 per hour or $240.00 per week]; the American Citadel motorized security guard job [$6.50 per hour or $250.00]; and the Papa John's Pizza delivery job [$5.15 per hour, excluding tips and delivery incentives], I find Claimant's post-injury wage earning capacity is $5.81 per hour or $232.40 per week.[3]

C. Diligent Search and Willingness to Work

If the employer has established suitable alternative employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates he diligently tried and was unable to secure employment. Fox v. West State, Inc., 31 BRBS 118 (1997); Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988).

The claimant must establish that he reasonably and diligently attempted to secure some type of suitable alternative employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. Turner, supra. If a claimant demonstrates he diligently tried and was unable to obtain a job identified by the employer, he may prevail. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986).

In the present case, I find Claimant has not been diligent nor reasonable in his attempts to return to work. Claimant failed or refused to seek employment in Morgan City, Louisiana, or Raceland, Louisiana, which is not an unreasonable distance from his residence. Although, he claims he applied for several jobs, he did not seek accommodations from prospective employers and, in fact, only spoke to prospective co-employees about job requirements. Further, he did not express an interest in returning to employment which, I find, is reflective of an unwillingness to return to gainful employment.

Therefore, I find Claimant is permanently and totally disabled from the date of MMI, October 23, 1995, to the earliest date suitable alternative employment was established on October

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[3] These figures are derived by averaging the generic hourly rates of the seven suitable alternative positions ($5.00 + $5.00 + $8.00 + $5.00 + $6.00 + $6.50 + $5.15 = $40.65 ÷ 7 = $5.81 per hour x 40 hours = $232.40).

7, 1996, after which he is permanently partially disabled.

D. Reasonableness and necessity of evaluation by Dr. Butler

An employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization. Slattery Assocs. v. Lloyd, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT) (D.C. Cir. 1984); Swain v. Bath Iron Works Corp., 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused, however, where the claimant has been effectively refused further medical treatment. Lloyd, 725 F.2d at 787, 16 BRBS at 53 (CRT); Swain, 14 BRBS at 664; Washington v. Cooper Stevedoring Co., 3 BRBS 474 (1976), aff'd, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977); Buckhaults v. Shippers Stevedore Co., 2 BRBS 277 (1975).

An employee cannot receive reimbursement for medical expenses under Section 7(d)(1) of the Act unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982) (per curium), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Bros., Inc., 16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding Div., Litton Sys., 15 BRBS 299 (1983); Schoen v. U.S. Chamber of Commerce, 30 BRBS 112 (1996). Once the employer has refused to provide treatment or to satisfy a claimant's request for treatment, the claimant is released from the obligation of continuing to seek the employer or the carrier's approval. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Betz, 14 BRBS at 809. See generally Lloyd, supra. The claimant then need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury, in order to be entitled to such treatment at the employer or carrier's expense. See Rieche, 16 BRBS at 275; Beynum, 14 BRBS at 958; Wheeler v. Interocean Stevedoring, 21 BRBS 33 (1988) (corrected version).

In the instant case, Claimant sought the services of Dr. Butler, an orthopedist, after talking to his sister and because he "got tired of seeing neurologists." Claimant never sought prior approval from Employer or Carrier before treating with Dr. Butler. Upon examination, Dr. Butler proffered the same opinion

as Dr. McKowen, namely that Claimant has a fifteen percent permanent partial disability rating to the whole body. Dr. Butler's notes indicate he recommended a second surgical fusion for Claimant, but that Claimant stated he did not desire to have another surgery. Dr. McKowen testified he did not believe it was necessary for Claimant to seek a second opinion of his treatment.

Accordingly, I find that Claimant has not established that the treatment by Dr. Butler procured on his own initiative without seeking the prior approval of Employer or Carrier was not necessary for treatment of his injury. Therefore, I find and conclude Claimant's medical expenses associated with treatment by Dr. Butler are not the responsibility of Employer or Carrier.

E. Reasonableness and necessity of further surgery

Pursuant to Section 7(a) of the Act, the employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. In order for the employer or carrier to be liable for a claimant's medical expenses, the expenses must be reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255 (1984). Section 7 does not require that an injury be economically disabling in order for the claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.

An employer found liable for the payment of compensation is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1986). If a work injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease or underlying condition, the entire resultant condition is compensable. See Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986).

In the instant case, Claimant testified he desires to have a spinal fusion surgery performed by Dr. Butler. However, Dr. Butler testified Claimant stated he did not desire to undergo any further surgical procedures. Based upon Claimant's statements, Dr. Butler assigned a fifteen percent permanent partial disability rating. Dr. McKowen, Claimant's treating physician, opined he had no further surgical procedures which would benefit Claimant. Based on these objective findings, Dr. McKowen, like Dr. Butler, assigned a fifteen percent permanent partial disability rating to Claimant.

I find the reasoned medical opinion of Dr. McKowen to be persuasive in this matter that no further surgical procedure would be beneficial to Claimant. Initially, Dr. McKowen has been Claimant's treating physician since the work accident. It is well-settled that the opinions of the treating physician are entitled to greater weight than the opinions of non-treating physicians in administrative proceedings. See, e.g., Loza v. Apfel, 219 F.3d 378, 395 (5th Cir. 2000); Downs v. Director, OWCP, 152 F.3d 924 (9th Cir. July 10, 1998) (unpublished); Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). Dr. McKowen noted Claimant received very little response from the April 1995 microdiscectomy because he has an unsalvageable nerve root. Accordingly, I find and conclude that another surgical fusion would not be reasonable or necessary for Claimant based on the medical evidence of record.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer paid temporary total disability compensation from Claimant's job injury through October 29, 1996, and from November 20, 1996 through May 27, 1997. Employer filed a Notice of Controversion on May 29, 1997. In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury

or compensation was due.[4] Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days to file with the deputy commissioner a Notice of Controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801 n.3 (1981). A Notice of Controversion should have been filed by June 25, 1997 to be timely and prevent the application of penalties. Thus, I find and conclude that Employer filed a timely Notice of Controversion on May 29, 1997, and thus is not liable for any penalties.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an

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[4] Section 6(a) is not applicable since Claimant suffered his disability for a period of more than fourteen days.

application for attorney's fees.[5] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary and total disability from November 28, 1994 through October 22, 1995, based on Claimant's stipulated average weekly wage of $393.44, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent and total disability from October 23, 1995, through October 6, 1996 when suitable alternative employment was established, based on Claimant's stipulated average weekly wage of $393.44, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay Claimant compensation for permanent and partial disability from October 7, 1996 and

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[5] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge should compensate only the hours spent between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 823 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for hours earned after **September 17, 1999**, the date the matter was referred from the District Director.

continuing based on the difference between Claimant's average weekly wage of $393.44 and his reduced weekly earning capacity of $232.40, in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's November 28, 1994 work injury, except expenses associated with Dr. James Butler's treatment which were not authorized, pursuant to the provisions of Section 7 of the Act.

5. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

6. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 18th day of May 2001, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge